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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 176.

HAGGAR COMPANY, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Petitioner is in agreement with the repeated assertion of respondent in his brief that under Section 215 (f) of the National Industrial Recovery Act, the taxpayer has absolute discretion to determine the adjusted declared value of its capital stock for the first year, which is the one involved in the present case (Br. 9). We agree with respondent that it was the intention of Congress under the plan of the Act as carried out in Sections 215 and 216 that the truth or untruth of taxpayer's declaration of value was purposely made irrelevant. We agree with respondent that the taxpayer had the right to declare "any valuation, no matter how fantastic," which it might choose,

in its first return under Section 215 (f) and that the Commissioner of Internal Revenue is without authority himself to change it.

We agree with respondent that the purpose of the Act was to avoid the controversies over valuation which had been experienced under prior revenue acts and that adequate protection was afforded to the Government by the combined operation of the capital stock and excess profits taxes (Br. 14).

We believe however that the purpose of the capital stock tax and excess profits tax provisions of the National Industrial Recovery Act were accurately stated by Judge Littleton of the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, (motion for new trial denied and second motion filed November 8, 1939) when he said:

> "In the Conference Report on Section 701 of the Revenue Act of 1934, which carried forward the provisions of section 215 of the National Industrial Recovery Act (Congressional Record, Vol. 78, Part 7, p. 7827), it was said by the managers on behalf of the House of Representatives that 'For the first year the tax is measured by the value of the capital stock as declared by the corporation as of the close of its last taxable year ending on or before June 30, 1934. The value of the capital stock having been declared for the first year, such value may not be subsequently amended.' Inasmuch as the primary purpose of the statute was to require the taxpayer to make a declaration of the value of its capital stock at the close of its last capital-stock tax year ending on or before June 30, 1934, and to be subsequently bound thereby in subsequent capital-stock tax years and each income-tax year ending after the close of the first taxable capital-stock year, no reasonable rule of interpretation requires the conclusion that the corporation may not, within the time allowed for filing a capital stock-tax return for the first year, declare the value of its stock upon which it intends to stand and be bound in subsequent years in a timely corrected or amended return disclosing a de-

cared value different from the value previously stated in a capital stock-tax return filed for such year. *Glenn v. Oertel Company*, 97 Fed. (2d) 495. The statute was not dealing specifically with returns as such, but with value and taxable years."

See also *C. H. Mead Coal Co.* v. *Commissioner*, 106 Fed. (2d) 388 (C. C. A. 4th).

Inasmuch as we agree with respondent that Congress intended taxpayers in their returns for the first year under Section 215 (f) of the National Industrial Recovery Act, to be entirely free to select any value upon which they intended to stand and be bound in subsequent years, it is not our intention as suggested by respondent (Br. 14-15) to argue that petitioner's right to amend depends upon the correctness or incorrectness of the intended declaration of $250,000 or the improvident unintentional declaration of $120,000.

While mistakes involving actual value may have been made in the improvident declarations in *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495, and in the *Philadelphia Brewing Co.* v. *United States, supra,* cases, we do not believe that the right to correct or substitute an unintended declaration (within the time during which a timely declaration might be made) is a necessary condition precedent to the right to substitute an intended declaration of value, for an unintended declaration prematurely and improvidently made.

There is nothing in the statement of the law in *Philadelphia Brewing Co.* v. *United States, supra,* to indicate that that case was predicated upon any supposed right to correct a mistake involving the truth or untruth of value.

On page 13 of respondent's brief it is argued that the language of the Act is clear and not susceptible of varying shades of meaning. It is also argued that there can be no construction when there is nothing to construe. That there is something to construe, we believe is clearly indicated by the following:

The Commissioner of Internal Revenue in his current Regulations, Article 44 of Regulations 64 (1938 ed.) at present construes the parenthetical words "which declaration of value cannot be amended" as permitting an amendment in a subsequent return filed within the period for making an original declaration of value under Section 601 (f) (2) of the Revenue Act of 1938. This same construction was applied to the identical prohibition against amendment by the House Committee on Ways and Means (H. Rep. 1860, 75th Cong. 3rd Session) of which as pointed out by respondent (Br. 18) fifteen members including the Chairman considered and reported on Section 601 of the 1938 Act as well as Section 215 of the National Industrial Recovery Act of 1933.

In his brief (Br. 17-18) respondent has unequivocally approved as correct, the view that the identically worded parenthetical prohibition against amendments contained in the 1938 Act is to be construed as permitting "a second return to be filed before the due date of the first one." The same construction of this identical phrase also has been adopted by the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, *supra*, and by the United States Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Oertel Company*, *supra*.

The only other words in Section 215 (f) of the National Industrial Recovery Act which might be construed either to prevent or not to prevent amendment within the time for filing first returns as extended are the words "first return under this section." To construe these latter words in such an "unduly restrictive" sense as to mean *the first document or piece of paper filed under this section as a return*, would render the parenthetical prohibition against amendment wholly superfluous and redundant.

Obviously if such an "unduly restrictive" construction, denying all opportunity for correction, had been intended, it would have been wholly unnecessary for Congress also to have added, as it did, the words "which declaration of

value cannot be amended." Therefore, the fact that Congress considered it necessary to add those words, indicates that it believed them to have a necessary added meaning not otherwise embodied in the words "first return under this section." This sensible view makes it reasonable therefore to construe those latter quoted words as alluding merely to the return for the first year under this section, as distinguished from returns for "any subsequent year ending June 30."

The prohibition against amendments which has appeared in every capital stock tax law commencing with the National Industrial Recovery Act is worded as follows:

"which declaration of value cannot be amended."

The prohibition was not against amending *returns* but against amending *declarations* of value. With this in mind, therefore, and considering that the declaration provided for in the Act was not due to be made until the last day for filing a return as extended, on which date, the tax itself became due, namely, September 29, 1933, declarations of value for the first year would not become effective until that date.

Inasmuch as it was the purpose of Congress that taxpayers were freely to choose the value by which they were to be bound in subsequent years, it is not a violation of the letter of the law or the purpose of Congress to permit a taxpayer, in attempting to exercise that free choice, to withdraw an improvident and unintended declaration and substitute a declaration freely intended by him, in accordance with the obvious purpose of Congress.

It is most significant that the Commissioner of Internal Revenue in Treasury Regulations 64, (1938 Edition), Article 44 construes the identically worded prohibition against amendments "which declaration of value cannot be amended" as follows:

"A corporation making a declaration of value on a return filed within the statutory period for filing re-

turns (up to and including the last day of any extension period) may, before the expiration of such period, change, amend, or correct the value by filing another return to take the place of the one previously filed. However, in such case, the last return received by the collector within the prescribed period constitutes the return required by law and the value declared thereon become the declared value." (See Appendix, p. 16)

In the 1938 Act there has been no fundamental change from the purpose of the plan of capital stock and excess profits taxes under the National Industrial Recovery Act to make the above quoted regulation any more applicable to the capital stock and excess profits tax law of 1938 than to such laws in the National Industrial Recovery Act. The fundamental purpose has been the same in every act commencing with the National Industrial Recovery Act, namely, to make the declaration freely adopted by the taxpayer in his return for the first year under the law, binding upon him (except for the adjustments specifically provided for) for all subsequent years for both capital stock and excess profits tax purposes. That this fundamental purpose will be rigidly served under the construction contended for by petitioner is certainly demonstrated by the adoption of the above construction of the prohibition against amendments by the Commissioner of Internal Revenue in his current regulations.

The construction of this prohibition against amendments contended for by respondent is admitted by him (Br. 18) and by the Committee on Ways and Means of the 75th Congress (Br. 18) to be "unduly restrictive." See also Internal Revenue Bulletin, No. 1, January 2, 1939, page 59, (petitioner's brief, page 7).

On pages 19 and 20 of respondent's brief reference is made to what is called "the consistent administrative construction expressed in the regulations" and the "undeviating administrative construction, which has enjoyed legislative approval through reenacting of the statutory provi-

sion without material change." Respondent argues that this so-called "consistent" and "undeviating administrative construction" should be regarded as establishing the proper construction of Section 215. However, the construction by the Commissioner of Internal Revenue of this prohibition against amendments has been anything but "consistent" or "undeviating."

We are concerned here with the construction of Section 215 (f) of the Revenue Act of 1933, and particularly with the effect of the parenthetical prohibition against amendments "which declaration of value cannot be amended." This prohibition has been included in every capital stock tax law beginning with Section 215(f) of the National Industrial Recovery Act down to and including Section 601 (f) (2) of the Revenue Act of 1938.

Treasury Regulations 64 (1933 Edition) relating to the capital stock tax under Section 215 of the National Industrial Recovery Act contained the following in its construction of the parenthetical prohibition against amendments:

> "This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner."

In Treasury Regulations 64 (1934 Edition) relating to the capital stock tax under Section 701 of the Revenue Act of 1934, which was substantially the same as the previous law, the Commissioner did not adhere consistently to the above quoted simple sentence. On the contrary, in Article 41, it defined "first return" as meaning "the first capital stock tax return filed by a corporation for its first taxable year," and in Article 42, included the following:

> "Extreme care should be exercised by the corporation in making this original declared value, for the reason that when the value has been declared such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner; when the right to declare such original declared value has been exercised, the right does not recur."

These regulations, it will be seen, are somewhat more restrictive, although following a similarly worded Act, than the previous regulations.

Treasury Regulations 64 (1936 Edition) relating to capital stock tax under Section 105 of the Revenue Act defined the term "original declared value" as meaning the value "as declared by the corporation in its first return for its first taxable year." Article 44 of those regulations included the following:

> "A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute."

It will be seen, that each new regulation becomes more and more "restrictive" in its interpretation of the identically worded prohibition until finally in the 1936 Edition the interpretation has become "unduly restrictive." However, Treasury Regulations 64 (1938 Edition) Article 44, relating to capital stock tax under Section 601 of the Revenue Act of 1938, construed these same words "which declaration of value cannot be amended," which had been used uniformly in all previous capital stock tax laws, commencing with the National Industrial Recovery Act, as permitting a second return to be effective if filed before the due date of the first one. See quotation from Article 44 pages 5 and 6 of this brief. This regulation is an exact reversal of the immediately preceding regulations.

The above complete history of the administrative construction of the words "which declaration of value cannot be amended," is too deviating and too inconsistent to have the force and effect of law. If these constantly changing regulations had the force and effect of law the Commissioner of Internal Revenue could amend the law at will. We are satisfied that he has no such authority.

The only construction by the Commissioner, which can be regarded as having the force and effect of law under the

rule of law, sought to be invoked by the respondent, is his construction in Treasury Regulations 64 (1933 ed.). This construction is consistent with and does not seek to add anything to the law, it merely paraphrases substantially the wording of the law. This construction which is consistent with petitioner's view is worded as follows:

> "This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner."

It was not until the regulations under a subsequent Act (Regs. 64 (1936 ed.) under the Act of 1935) were promulgated that the provision was inserted specifically *prohibiting* the amendment during the time for filing. This subsequent construction being in effect overruled by the regulations under the 1938 Act, certainly cannot be regarded as having the force and effect of law retrospectively in construing the National Industrial Recovery Act of 1933. After the regulations prohibiting a timely amendment were promulgated, Congress never passed a law approving such regulations (Regs. 64 (1936 ed.)), because, in passing the next law, namely, the Revenue Act of 1938, the Committee clearly indicated that any construction preventing a timely amendment would be "unduly restrictive." While it has been suggested by respondent (Br. 17-19) that this criticism was addressed by the Committee only to the word "first" as it appeared the *second* time in Section 105 (f) of the 1935 Act, and that only the elimination of this word had the effect of justifying the changed construction, it would be more reasonable to regard the elimination of this word as a mere clarifying amendment and not as one affirmatively changing the actual meaning of the original law. Certainly the Ways and Means Committee did not intend to *approve* by its report, a construction of the previous laws, which it was specifically *condemning* as "unduly restrictive."

It is more logical to assume therefore that Congress had in mind that, in the light of what the Supreme Court said

in *Helvering* v. *New York Trust Company*, 292 U. S. 455, 468, 469, 54 S. Ct. 806, 810, that variation would be regarded as intended merely "to clarify what was doubtful and so to safeguard against misapprehension as to existing law."

In any event it is obvious that the real change effected by Section 601 of the 1938 Act was making new declarations binding for only *three years* instead of *permanently* as in Section 215 (f) of the National Industrial Act, Section 701 (f) of the Revenue Act of 1934 and Section 105 of the Revenue Act of 1935.

The material language of each of the above sections of these prior laws is identical and reads as follows:

> "For *the first year ending June 30* • • • the adjusted declared value shall be the value, as declared by the corporation in its *first return under this section* (which declaration of value cannot be amended), • • •." (Italics indicate language eliminated in 1938 Act.)

The corresponding provisions of the 1938 Act are as follows:

> "For *each declaration year* the adjusted declared value shall be the value, as declared by the corporation in its *return for such declaration year* (which declaration of value cannot be amended), • • •." (Italics indicate language substituted in 1938 Act for that eliminated from earlier acts.)

Thus the changes involved eliminating the words "first year" and "first return." Obviously the correlative significance of the two words "first" in the earlier acts disappeared with the plan to make declarations binding for three successive years. Congress did not have to eliminate the words "first year" in order to permit the correction of errors in declaration returns filed within the time for filing returns. The phrases "first year" and "first return" under the earlier Acts had a definite relation toward one another corroborated by their simultaneous elimination un-

der the new plan. The words "*first* return" obviously mean return for the "*first* year" as distinguished from returns for any subsequent year.

The adverse rulings in *Wm. B. Scaife & Sons Co.* v. *Driscoll*, 94 Fed. (2d) 664 (Cer. den. 305 U. S. 603), and in *Blake & Kendall Co.* v. *Commissioner*, 104 Fed. (2d) 679 (Br. 12) are the only Circuit Court of Appeals decisions cited by respondent in support of the argument that returns may not be amended even before the due date of the declaration return. Both of these cases are predicated specifically and *solely* on a construction of the words "which declaration of value cannot be amended." There is no attempt in either to construe the words "first return" themselves as meaning the first document or piece of paper filed as a return.

In *Rosoff Tunnel Corp.* v. *Higgins*, 28 F. Supp. 880, the amended return was sought to be filed "sixteen months after filing its original return." It is, therefore, not in point here. *Webster* v. *Commissioner* (Br. 13), 37 B. T. A. 800, in which case there was a very strong dissent, is on appeal to the United States Circuit Court of Appeals for the Sixth Circuit. This decision is in conflict with the view of that same Circuit in *Glenn* v. *Oertel Co., supra.* Also, *Wm. B. Scaife & Sons Co.* v. *Driscoll, supra,* is unlike the case at bar. That case was a suit to enjoin the collector from refusing to receive an amended return in lieu of the original return. The Court held that such injunctive procedure was forbidden by Section 3224 R. S. because the taxpayer had an adequate remedy at law consisting of a suit to recover tax as unlawfully collected.

As long as petitioner and respondent agree that the truth or untruth of a declaration was purposely made irrelevant it would seem to be immaterial whether or not "excuse is offered for failure to follow the clear instruction printed on Form 707 (R. 25)." (See respondent's brief, page 9.)

On page 19 of Respondent's brief there is discussed the applicability of the rule laid down by this Court in *Gould* v. *Gould*, 245 U. S. 151, regarding the resolving of doubts

most strongly against the Government. Respondent argues that the rule does not apply, on the ground that, "the statute does not operate harshly here." We believe, however, that the statute, as sought to be construed by respondent, does operate *harshly* here, and that the facts and learned discussion in the case of *McIntosh* v. *Wilkinson*, 36 Fed. (2d) 807, 811, are pertinent to illustrate that view and to be generally helpful in deciding this case. In that case a husband and his wife, in ignorance of the mere tax effect of filing joint instead of separate income tax returns, improvidently filed joint returns for 1925. Later, but still within the time for filing 1925 returns, they filed separate returns and claimed refund of the difference in tax, due to filing of separate returns. The Commissioner held that the original improvident filing of joint returns constituted a *binding election*, precluding the substitution of separate returns and denied the refund claim. Upon suit on the claim, the District Court for the Eastern District of Michigan, after a most enlightening review of the general principles of election, as applied to elections in income tax returns, allowed the refund on the ground that

> "* * * an election made by a party under a misconception of his rights, is not binding."

As to the Commissioner's ruling denying amendment, the Court quoted in part from the often cited case on elections of *Standard Oil Co. of Ky.* v. *Hawkins*, 74 Fed. 395, as follows:

> "We do not understand the law to justify so *harsh* a rule." (Emphasis ours)

As to the decision of the District Court in *Grant* v. *Rose*, 24 Fed. (2d) 115, *denying* the right of husband and wife to change from joint to separate returns *after the time for filing had expired*, the Court, in *McIntosh* v. *Wilkinson*, said at page 812 of 36 Fed. (2d), that the facts and judicial utterances in that case

"go no further than to declare the period of the statute *for making returns* to be a limitation of the period of election, beyond which the latter right ceases to exist."

Grant v. *Rose* was affirmed in *Rose* v. *Grant*, 39 Fed. (2d) 340. This latter case was cited with approval by this court in *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194, 58 S. Ct. 857, 858. This latter case involved an *election* to file income tax returns on the completed transaction basis and a later attempt to amend to file on the installment basis *"after the expiration of the time within which return is to be made."* This Court left the door open to amendments *within the time for making returns* in that case, when it said:

"There is nothing to suggest that Congress intended to permit a taxpayer, after the expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method."

In the instant case, the statute does operate harshly here if construed as it was by the Circuit Court of Appeals as to prevent the taxpayer from making the declaration it clearly intended and desired to make within the time as extended for making such declarations. The intended declaration of $250,000 was rejected, although made within the prescribed period for filing, and the unintended declaration of $120,000 was forced upon taxpayer, contrary to its free will, contrary to the intention of the law, with the harsh result that the taxpayer is being required to use a lower excess profits tax credit than it desired and intended to use (12½ per cent of $120,000 or $15,000 instead of 12½ of $250,000 or $31,250). This construction of the statute operates harshly by reflecting a tax deficiency upon petitioner in the amount of $812.50, which it would not be required to pay if the statute were construed to permit the amendment sought by petitioner.

The passage of private Act 199 by the 75th Congress, First Session (c. 440, 50 Stat. 1014) in the *Jackson Casket & Mfg. Co.* case referred to by respondent on pages 16 and 17 of his brief is not in point here. In that case no timely correction of the first return under Section 105 of the 1936 Act was attempted. However, nearly a year after the first return under this section had been filed, the taxpayer was about to file its *second return under this section*, namely its return for the *second year*, ended June 30. The declaration in the first return was erroneously stated due to an error committed by the Western Union Telegraph Company. The taxpayer wanted to save itself capital stock taxes in its *second return*, namely, its return for the year ended June 30, 1937. It was then too late to make a timely correction. Taxpayer knew it was too late and the Chairman of two committees referred to in respondent's brief (R. 17) had every reason to assume, as suggested by respondent, that it was too late to amend the first return, without the aid of Congress. That case is not parallel to the instant case.

CONSTITUTIONAL QUESTION.

On pages 21 and 22, respondent urges that petitioner has shown no standing to question the constitutionality of the Act. It is stated that the pleadings do not raise any issue of valuation and that there is no evidence in the record to show that the value declared in either return represented the actual value of the shares.

We believe that the constitutional question was sufficiently brought into the petition for certiorari (pages 6 and 7 of the petition) by the combination of (a) the specification of error that the Circuit Court of Appeals erred in holding petitioner's capital stock tax return could not be and was not amended by the return filed September 28, 1933, and (b) the argument quoted from the opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Glenn v. Oertel Company, supra*, to the effect that no such harsh and

far-reaching results were intended and that if they were, serious constitutional questions arise. We think this gives adequate standing to question the constitutionality of the statute, under the construction of the Circuit Court of Appeals for the Fifth Circuit that no amendment may be made.

The constitutional question is one of great general importance because, as indicated in respondent's brief (Br. 9) capital stock declarations and the excess profits taxes "of over 300,000 business corporations" are involved. If the entire scheme of taxation imposed under the plan of the statute by Sections 215 and 216, is not based on any proper subject of taxation, but is imposed without regard to true fact, on the basis of an irrebuttable presumption of fact, not intended to be consistent with true fact under "a statute creating a presumption which operates to deny a fair opportunity to rebut it," the statute "violates the due process clause of the Fourteenth Amendment." *Heiner, Collector v. Donnan et al.*, 285 U. S. 312, 329, 52 S. Ct. 358, 362. If on the face of the record, such facts are apparent as will bring this tax within this rule, this Court may, under its Rule 27, paragraph 6, "at its option," notice the error whether or not assigned or specified.

Respectfully submitted,

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APPENDIX.

Treasury Regulations 64 (1938 ed.) relating to the capital stock tax under Section 601 (f) of the Revenue Act of 1938:

ART. 44. Declared value.—In its return for each declaration year, a corporation must declare a definite and unqualified value for its capital stock. The declaration of value must be made in terms of United States dollars and be specific, as, for example, $10,000, or "Zero," in the event it is desired to indicate no value. Inasmuch as the declared value can in no case be less than zero, a declaration of a deficit or minus figure shall be considered a declaration of "Zero."

The value shall be declared as of the close of the income-tax taxable year ending with or prior to the close of the declaration year, as or of the date of organization if the corporation has no income-tax taxable year ending with or prior to the close of the declaration year. Thus, for the declaration year ended June 30, 1938, the value shall be declared as of December 31, 1937, if the corporation makes its income tax returns on a calendar year basis, or as of the close of any other month from July 1937, to and including June 1938, if its income tax returns are made on the basis of a fiscal year ending with such month. In the case of a newly organized corporation which does not have an income-tax taxable year ending with or prior to the close of the declaration year, June 30, the value shall be declared as of the date of organization.

A corporation may exercise unrestricted judgment and discretion in determining the value to be declared for its capital stock on a return for any declaration year. In making such declaration, the corporation is not bound by any previous declaration of value.

Extreme care should be exercised in making the declaration of value, since once made it can not be changed, amended, or corrected, except as otherwise provided for in this article, either by the corporation or by the Commissioner. It is not only binding with respect to the year for which declared, but is also the basis for computing adjusted value for any succeeding adjustment year or years of the 3-year period, and con-

stitutes a prime factor in computing the excess profits tax, if any, for the applicable income-tax taxable years under section 602 of the Revenue Act of 1938. **A corporation making a declaration of value on a return filed within the statutory period for filing returns (up to and including the last day of any extension period) may, before the expiration of such period, change, amend, or correct the value by filing another return to take the place of the one previously filed. However, in such case, the last return received by the collector within the prescribed period constitutes the return required by law and the value declared thereon becomes the declared value.**

(Portion printed in shaded type is exactly inconsistent with Article 44, Treas. Regulations 64 (1936 ed.).)